Petition

81-306

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL D. JACOBSON and
DAVID VAN BODEGRAVEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Counsel for Petitioners

August 14, 1981

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IN THE

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QUESTIONS PRESENTED

1. Whether an "extended border search" authorized federal customs agents to search fenced in real property under circumstances where the officers either knew or concluded that contraband birds had been taken from the smuggling vehicle and placed in a caged area hundreds of feet from the vehicle?

2. Whether 19 U.S.C. §482, 19 U.S.C. §1581(a) or 19 U.S.C. §1595(b) either eliminates the petitioners expectation of privacy or authorizes federal customs agents to search real property independent of the search for a vehicle?

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Petitioners Michael D. Jacobson and David Van Bodegraven respectfully pray that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 12, 1981.

OPINION BELOW

The opinion of the United States Court of Appeals, for the Ninth Circuit is officially reported at and appears in the appendix hereto at A-1. A copy of the judgment rendered in the trial court, the United District Court for the District of Arizona on July 24, 1980, appears in the appendix hereto at A-21.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was decided on June 12, 1981. The petitioners timely filed their petition for rehearing which was denied on July 15, 1981. This petition for certiorari was filed within thirty (30) days of that date. The statutory provision which confers jurisdiction on this Court to review the judgment of a United States Court of Appeals in a criminal matter by writ of certiorari in 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Forth Amendment to the Constiution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 482 of 19 U.S.C. provides:

> "Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced itno the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to serach any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which

he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

Section 1581(a) of 19 U.S.C. provides:

BOARDING VESSELS. Customs officers.
(a) "Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

Section 1595(b) of 19 U.S.C. provides:

Entry upon property of others.
(b) "Any person authorized by this chapter to make searches and seizures, or any person assisting him or acting under his directions, may, if deemed necessary by him or them, enter into or upon or pass

through the lands, inclosures, and buildings, other than the dwelling house, of any person whomsoever, in the discharge of his official duties.

HOW FEDERAL QUESTION PRESENTED.

The federal questions involved herein were first raised in the memoranda attached to the petitioners motions to Suppress filed in the United States District Court for the District of Arizona prior to trial. They were again raised in the briefs of the parties in the United States Court of Appeals for the Ninth Circuit and further discussed in oral argument. The opinion of the Court below discussed those federal statutory and constitutional issues.

STATEMENT OF THE CASE.

Pursuant to their supposed authority as United States Customs agents to make an "extended border search" federal agents

entered upon the fenced land of the petitioners on April 30, 1980, during the evening hours for the purpose of seizing a large quantity of smuggled parrots which the agents believed had been placed inside a cage located some one hundred (100) yards from the vehicle in which they had been smuggled. The petitioners were arrested approximately 100 feet from the main residence occupied by the family of Petitioner Michael D. Jacobson and near the guest house occupied by petitioner David Van Bodegraven.

The arrest of the petitioners was the culmination of several months of work by a "task force" of United States Customs Agents that had agreed to "target" the petitioner Michael D. Jacobson for enforcement action. Early in the work of the task force a Mexican citizen, Mr. Gustavo Preciado, was recruited as a paid informant for the Jacobson Task Force.

After being recruited by the government agents Mr. Preciado travelled into the interior of Mexico to the state of Nayarit where he purchased some three hundred (300) parrots from two Mexican citizens, the co-defendants Cosme Guerrero and his father Pomposo Cuerrero. Mr. Preciado claims to have accompanied the Guerreros and his newly acquired parrots to the Mexican boarder at Nogales, Arizona. During the trip and continuously until the parrots arrived in Tucson, Arizona Mr. Preciado kept the government agents informed of all the details of the planned smuggling venture.

The custom agents had previously become familiar with exact location and physical layout of the premises owned by the petitioners. Aerial photographs of the premises had been taken over two months prior to the controlled delivery

of the parrots. The aerial photographs in turn had been verified by a day time visit by a customs agent on the pretext of being a potential customer of Mr. Jacobson's business known as Pet Ranch Imports.

The premises consisted of two residences and swimming pool together with a couple of small buildings for reptiles on several acres of Sonoran desert land surrounded by a barbed wire fence. Scattered throughout the land were various outdoor cages occupied by birds and mannals that constituted part of the stock in trade of Mr. Jacobson who ran a wholesale pet business. The premises were located a few miles to the southwest of Tucson, Arizona, a city of some one-half million residents, and over sixty miles from the Mexican border at Nogales, Arizona.

Due to the constant reporting and conferring with Mr. Preciado, the government agents were aware of all the important details of the planned smuggling venture including the time and place of the border crossing and the time and place of the intended delivery of the birds at the residence of the petitioner Mr. Jacobson.

The government agents thus were able to follow the van of Mr. Preciado as he drove the birds to Tucson where he met two female co-defendants at a shopping center parking lot for the purpose of transferring the birds to their vehicle for eventual delivery to Mr. Jacobson. When the women arrived at the Jacobson premises various agents were in hiding on all sides of the property in order to observe the delivery of the birds,

As various of the agents converged on the front gate of the property they were able to observe a flashlight move from the residence area where the delivery vehicle had been parked toward a large cage where the birds were eventually seized. Believing that the birds were now in the cage and pursuant to their prearranged plan the agent in charge radioed the signal to enter the premises and make a warrantless seizure and arrests.

Once on the property the agents fanned out to search the cages before the vehicle or house was searched. The petitioners were arrested near the guest house where Mr. Van Bodegraven lives and approximately two hundred feet from the cage where the birds were seized and one hundred feet from the main house.

The United States District Court for the District of Arizona in an order by Judge Richard M. Bilby on July 24, 1980, suppressed the evidence upon the grounds that an extended border search could not be made of real property. The United States Court of Appeals for the Ninth Circuit reversed the district court holding that the search was reasonable under the totality of circumstances and that certain specific federal statutes (19 U.S.C. §482, 19 U.S.C. §1581(a) and 19 U.S.C. §1595(b)) helped create a context wherein petitioner had no reasonable expectation of privacy on their premises.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE NINTH CIRCUIT, UNITED STATES COURT OF APPEALS CONFLICTS WITH THE OPINION OF THE FIFTH CIRCUIT IN UNITED STATES v. STEINKOENIG.

In United States v. Steinkoenig. 487 F.2d 225, 229 (5th Cir. 1973) the United States Court of Appeals for the Fifth Circuit rejected a search of a defendant's motel room by United States customs agents as not being a valid border search. The court stated:

> It could not have been a valid border search because the statute authorizing the agent's search permits warrant-less searches of a "vehicle, beast or person" not a residence.

The opinion of the Ninth Circuit in the opinion below is directly opposed to the Fifth Circuit view as expressed in Steinkoenig. The birds were seized by customs agents from a cage located some two hundred feet from the transporting vehicle and the arrested defendants. The entry upon the premises by the agents were made upon signal by the agent in charge after he concluded that the birds

had been removed from the cage before the vehicle itself was searched.

Hence, the opinion below, United States v. Jacobson, (9th Cir. 80-1571, June 12, 1981), is precisely opposed to the opinion and result in Steinkoenig. supra. The constitutional rights of the petitioners as secured by the Fourth Amendment to the United States Constitution should not be dependant upon which area of the republic the petitioners reside.

2. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS STANDS ALONE FOR THE PROPOSITION THAT AN EXTENDED BORDER SEARCH MAY BE MADE OF REAL PROPERTY.

The government did not cite one case in its memoranda or briefs where any court has approved the search of real property under the authority of a border search. All of the cases cited by the government or the Ninth Circuit in its opinion, involved the search of motor veciles.

It is, of course, not surprising that no such cases exist since real property cannot cross the border.

Only vehicles can cross the border whether on the ground, in the air or on the waters. The exception of allowing vehicles to be followed and searched many miles from the border is a norrow exception to general Fourth Amendment law. Once the agents were aware that the birds had left the smuggling vehicle and had been placed in the cage some three hundred feet distant the rationale for an extended border search had been exceeded.

Each of the recent cases cited by the Court below supports the petitioners position and not the government's argument. United States v. Espericueta - Reyes, 631 F.2d 616 (9th Cir. 1980) involved the search of a vehicle that was stopped within one mile of the border after continuous surveillance within one-and-one half

hours after it had crossed the border. In United States v. Moore, 638 F.2d 1171 (9th Cir. 1980) the Court approved the search by U.S. Customs officials of appellant's airplane and luggage at the airport where the plane first landed after being continuously monitored by radar from Mexican airspace. Each of those cases involves traditional border search authority to search vehicles under appropriate circumstances. Their theoretical bases fly in the face of the approval of real property searches.

The cited case of United States v. Richards, 638 F.2d 765 (5th Cir. 1981) where the Fifth Circuit approved the controlled delivery and search of a mailed package of herion that originated outside the country is not helpful in resolving the Jacobson problem. Such searches are unquestionably legal. The search of real estate under the same authority is a very separate question.

3. THE COURT MISREAD FEDERAL STATUTES IN ARGUING THAT PETITIONERS DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY AT NIGHT AT THEIR RESIDENCES INSIDE A COMPOUND FENCED IN BARBED WIRE.

The premises where the petitioners lived were a combination residence and commerical yard. The commerical business is primarily mail order wholesale to other dealers and is not open to the general public for retail sales. The search furthermore occurred at nighttime when the business is closed to all customers.

The Ninth Circuit laid great stress on the absence of any reasonable expectation of privacy of the petitioners because of their imputed awareness of congressional intent based upon Congress's enactment of 19 U.S.C. §482, 19 U.S.C. §1581(a) and 19 U.S.C. §1595(b). Those statutes, however, merely authorize the search of vehicles (19 U.S.C. §482 and 19 U.S.C. §1581) or the entry upon land for the purpose of

searching vehicles. 19 U.S.C. §1595 limits its statutory authorization for entry upon land to a person "in the discharge of his official duties." Those official duties relate to the searching of vessels or vehicles.

Neither those cited statutes nor any others authorize the search of real property independent of the search for a vehicle or a vehicle. Therefore, the petitioners could not have had a lessened expectation of privacy due to the existence of the cited statutes.

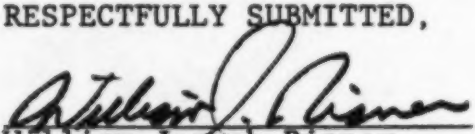
C O N C L U S I O N

The challenged opinion of the United States Court of Appeals for the Ninth Circuit involves a question of exceptional importance in that it has approved the search of real property under circumstances where the officers either knew or concluded that contraband had been taken from a vehicle and placed in a caged area hundreds

of feet from the vehicle. As such, the Court approved greater authority than has been approved by any court under the authority of an extended border search and is in direct opposition to the view of the Fifth Circuit.

For the reasons set forth herein, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED,



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August 14, 1981

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL D. JACOBSON, and
DAVID VAN BODEGRAVEN,

Petitioners,

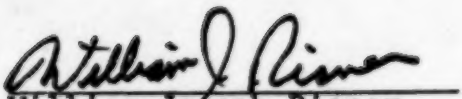
vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 1981, one copy of the Petition for Writ of Certiorari was mailed, postage prepaid, to Gerald S. Frank, Assistant United States Attorney, P.O. Box 1951, Tucson, Arizona 85702, and three copies were mailed, postage prepaid to Solicitor General, Department of Justice, Wahsington D.C. 20530. I further certify that all parties required to be served have been served.



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A P P E N D I X

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Opinion of the United States Court of Appeals, Ninth Circuit. A-1

Order of the United States District Court for the District of Arizona A-21

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellant,	)	No. 80-1571
	)	
v.	)	OPINION
	)	
MICHAEL D. JACOBSON and DAVID VAN BODEGRAVEN,	)	
	)	
Defendants-Appellees.	)	
	)	

Argued and Submitted Feb. 9, 1981

Decided June 12, 1981.

Appeal from the United States District Court for the District of Arizona.

Before TRASK and SNEED, Circuit Judges, and THOMPSON,* District Judge.

BRUCE R. THOMPSON, District Judge:

We have for consideration an appeal from an order of the district court

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*Honorable Bruce R. Thompson, Senior United States District Judge, District of Nevada, sitting by designation.

granting defendants' motion to suppress evidence. This court has jurisdiction pursuant to 18 U.S.C. § 3731.

The district court made thorough findings of fact which are supported by substantial evidence. Perhaps the issue may best be highlighted by first reciting the facts as found by that court.

In early 1980 United States Customs began an investigation into large scale parrot smuggling from Mexico into the United States. Specifically, the investigation would be directed at the activities of defendant Jacobson who operated a pet store on West Ajo Way in Tucson. Customs enlisted Mr. Gustavo Preciado to act an an informant in the investigation. The informant was dispatched to the interior of Mexico. On April 20, 1980, the informant called Customs agents and informed them that a large quantity of

parrots were going to be shipped from Ruiz, Mayarit, Mexico, to Hermosillo, Sonora, Mexico, for eventual smuggling into the United States at Nogales.

On April 28, 1980, in Nogales, Sonora, Mexico, the informant was present at a meeting between defendants Beatriz Quintero De Fajardo, Cosme Guerrero-Ibarra and Michael Jacobson. Defendant Moises Moreno-Perez served as interpreter. Business arrangements were concluded with regard to the purchase of the parrots by Jacobson. A business card was shown at the meeting, which had directions to defendant Jacobson's business on West Ajo on the back. Jacobson destroyed the card at the meeting and informed the others present that they should not carry any papers that would show any type of relationship with him. Jacobson further agreed to provide legal help if they should be arrested. The informant

communicated the results of the meeting to Customs.

On April 29, 1980, arrangements for the smuggling of the birds were completed. Since no other vehicles were available, the informant agreed to use his van. This information was also communicated to government agents.

On April 30, 1980, at 3:00 p.m. the informant called Customs agents and informed them that everything was arranged for the delivery of the parrots to defendant Jacobson in Tucson that evening. According to the plan, Defendant Fajardo would drive from Nogales to Tucson, and meet the informant with the birds in the van at the K-Mart Shopping Center on Valencia Road in Tucson. There they would trade vehicles with the women taking the van with the parrots for the actual delivery to Jacobson at his residence.

At approximately 6:00 p.m. on April 30, 1980, the informant crossed the port of entry from Mexico into the United States. He was driving a white Chevrolet van. The van moved down along the international border fence and stopped. The van then proceeded to Tucson, Arizona. The parties stipulated for the purposes of this motion, that from the time the van left the small hill or the large hill until the time it went to the front gate of Mr. Jacobson's house, it was surveilled and nothing was observed going in and out of the van except people. The van arrived at the K-Mart in Tucson at about 7:15 p.m.

Defendant Fajardo, together with another woman, crossed the border at Nogales in a black over blue Ford LTD at 6:20 p.m. The Ford was kept under constant surveillance from Nogales until

it arrived at the K-Mart at 7:45 p.m. The women traded vehicles with the informant, then proceeded in the van to 4340 West Ajo Way. They arrived at 8:10 p.m.

4340 West Ajo Way is a combination personal residence and commercial pet store that is jointly owed by defendants Jacobson and Van Bodegraven. The property is completely fenced with barbed wire fence, with gates that allow access to the property from two sides. There are several buildings in the compound, together with a swimming pool and some permanent animal cages. None of the cages nor anything other than the tops of houses are visible from the public roads.

Shortly after the women arrived at the gate, a vehicle drove from the house to where the van was parked. A gate was opened, and the van moved into the

compound. At 8:28 p.m. the property was completely surrounded by government agents who were in constant radio contact. No ingress or egress would have been accomplished on the property without detection by the officers. Agents, without either arrest or search warrants, entered the property from two sides. The gates were closed at the time the agents made their entry. Further, the agents were ordered to break locks on the gates, if necessary, to gain admission to the property. While on the property, agents found two small cages within the large animal cages on the premises that contained 154 parrots.[1]

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1. From the foregoing statement of facts the court concluded: "Clearly, when the van entered private property, the scope of the border search was exceeded, and other justification for the warrantless entry would be needed."

The court's statement of facts may appropriately be supplemented. The van was in sight of and under the surveillance of Customs Agent Wells. He and other agents saw another vehicle drive down to the locked gate, someone opened it, and the van was driven up the roadway a short distance. The gate was closed but not locked. It was dark. The Customs agents converged on the gate. They saw flashlights moving toward the area where they had been informed that animals and birds were kept in cages. The agents entered. Agent Burns went directly to the white van and there were no birds in it. He and Agent Wells encountered defendants approximately simultaneously near the bird cage area and arrested them. They found two cages packed with parrots which, inferentially, were in the same cages in which they had been transported. The

seized birds were found and the defendants arrested approximately 100 feet from the house in a brushy area south of the swimming pool.

The government's efforts to excuse failure to obtain a search warrant on the theory of probable cause and exigent circumstances under the related facts is futile. In this respect we agree with the district court. With respect to the second contention, however, we agree with the government that the search and seizure here were proper and reasonable as an extended border search. The district court held that a border search could not be conducted after the van and contents had entered onto the private property owned by defendants. We disagree.

In the first place, the fact that the search was conducted on private

property is not dispositive. Since Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), property interests have had slight import in the administration of the Fourth Amendment. In United States v. Magana, 512 F.2d 1169 (9th Cir. 1975) (a warrantless search of a private driveway), this court observed:

The question deferred in Bustamante-Gamez is before us again. The driveway where Magana was arrested was within the curtilage of the house Magana was using, but "a reasonable expectation of privacy," and not common-law property distinctions, now controls the scope of the Fourth Amendment. See Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

The proper inquiry is whether the officers' intrusion into the residential driveway constituted an invasion into

"what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public * * *." Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968).

A driveway is only a semiprivate area. The expectation of privacy which a possessor of land may reasonably have while carrying on activities on his driveway will generally depend upon the nature of the activities and the degree of visibility from the street. It would be equally unwise to hold, as a matter of law, that all driveways are protected by the Fourth Amendment from all penetrations by police officers as to hold that no driveway is ever protected from police incursions. The test in each case should be that of reasonableness, both of the possessor's expectations of privacy and of the officers' reasons for being on the driveway.

Here, the officers were providing security for their fellows who were known to be effecting the arrest of a narcotics dealer engaged in business in the residence of which the driveway formed a part. The act of the officers in turning into the driveway at the time and under the circumstances of this case was reasonable. Magana's privacy was not unreasonably invaded when the officers entered his driveway and then saw him throw something away. See United States v. Capps, 435 F.2d 637 (9th Cir. 1970). See also: United States v. Santana, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976)(a warrantless arrest on private property of arrestee); United States v. Allen, 633 F.2d 1282 (9th Cir. 1980)(at p. 1291, "it was not necessary for them (the officers" to secure an arrest warrant for the arrest made on Allen's property but

not in his home."); United States v. Capps, 435 F.2d 637 (9th Cir. 1970)(observation of contraband in locked car while on the curtilage of the owner's residence); United States v. Pruitt, 464 F.2d 494 (9th Cir. 1972); United States v. Freie, 545 F.2d 1217 (9th Cir. 1976).

The entire subject of extended border searches has been so recently canvassed in elaborate opinions of this and other courts that we are not disposed to burden the literature with extensive discussion. We allude primarily to the opinions in United States v. Espericueta-Reyes, 631 F.2d 616 (9th Cir. 1980); United States v. Moore, 638 F.2d 1171 (9th Cir. 1980) and United States v. Richards, 638 F.2d 765 (5th Cir. 1981). (None of these was available to the district court when it ordered suppression.) We note also the decision in United States v. Stanley, 545 F.2d 661 (9th Cir. 1976),

which applies the extended border search concept to exports as well as imports.

Suffice it to say, that we believe the facts of this case sustain the searches and seizures as a legal and reasonable extended border search because the totality of circumstances surrounding the search, including the time elapsed after the initial border crossing and the distance from the border are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of the search had been unlawfully imported and was in the vehicle at the time of or immediately subsequent to the unlawful entry. Cf. Alexander v. United States, 362 F.2d 379 (9th Cir. 1966); United States v. Markham, 440 F.2d 1119 (9th Cir. 1971); United States v. Weil, 432 F.2d 1320 (9th Cir. 1970).

Congress has enacted specific authorizations to Customs agents: 19 U.S.C. § 482, 19 U.S.C. § 1581(a), 19 U.S.C. § 1595(b).[2] In the context of determining whether respondents' reasonable expectation of privacy can be determined by the location of the barbed wire fence, these expressions of Congressional intent cannot be ignored. United States v. Di Re, 332 U.S. 581, 585, 68 S.Ct. 222, 224, 92 L.Ed 210 (1948); United States v. Watson, 423 U.S. 411,

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2. "stop, search, and examine . . . any vehicle . . . and . . . any truck or envelope, wherever found, . . . " 19 U.S.C. § 482 (emphasis supplied;) "at any time go on board of any vessel or vehicle at any place in the United States . . . " 19 U.S.C. § 1581(a) (emphasis supplied;) and, 'if deemed necessary,' to enter into or upon or pass through the lands, enclosures, and building, other than the dwelling house, of any person whomsoever, in the discharge of his official duties," 19 U.S.C. § 1595(b) (emphasis supplied).

96 S.Ct. 820, 46 L.Ed.2d 598 (1976).[3]

---

3. "Contrary to the Court of Appeals' view, Watson's arrest was not invalid because executed without a warrant. Title 18 U.S.C. § 3061(a)(3) expressly empowers the Board of Governors of the Postal Service to authorize Postal Service officers and employees 'performing duties related to the inspection of postal matters' to

> 'make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.'

By regulation, 39 CFR § 232.5(a)(3) (1975), and in identical language, the Board of Governors has exercised that power and authorized warrantless arrests. Because there was probable cause in this case to believe that Watson had violated § 1708, the inspector and his subordinates, in arresting Watson, were acting strictly in accordance with the governing statute and regulations. The effect of the judgment of the Court of Appeals was to invalidate the statute as applied in this case and as applied to all the situations where a court fails to find exigent circumstances justifying a warrantless arrest. We reverse that judgment.

"Under the Fourth Amendment, the people are to be secure in their persons

(Footnote 3 continued next page.)

(Footnote 3 continued)

3. houses, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause . . ." Section 3061 represents a judgment by Congress that it is not unreasonable under the Fourth Amendment for postal inspectors to arrest without a warrant provided they have probable cause to do so. This was not an isolated or quixotic judgment of the legislative branch. Other federal law enforcement officers have been expressly authorized by statute for many years to make felony arrests on probable cause but without a warrant. This is true of United States marshalls, 18 U.S.C. § 3053, and of agents of the Federal Bureau of Investigation, 18 U.S.C. § 3052; the Drug Enforcement Administration, 84 Stat. 1273, 21 U.S.C. §878; the Secret Service, 18 U.S.C. § 3056(a), and the Customs Service, 26 U.S.C. §7607.

"Because there is a 'strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is "reasonable,"' '[o]bviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional.' United States v. Di Re, 332 U.S. 581, 585, 68 S.Ct. 222, 224, 92 L.Ed 210 (1948). Moreoever, there is nothing in the Court's prior cases indicating that under the Fourth Amendment a warrant is required to make a valid arrest for a felony. Indeed, the relevant prior decisions are uniformly to the contrary."

Congress has expressly authorized the entry upon the "lands, inclosures and buildings, other than the dwelling house, of any person whomsoever." In further support of the conclusion that defendants had no such reasonable expectation of privacy as to preclude an extended border search of the vehicle (van) and the animal and bird cage area we rely on the undisputed evidence that defendants' fenced compound was not simply a residence but was also a place of business; that a couple of months previously one of the Customs agents had visited the establishment as a purported business visitor and had observed the layout of the roads, buildings and bird and animal cages; that on the night of the search and seizure the officers surveilling the premises saw flashlights moving about in the brushy area known to be the situs of the bird cages,

which was a considerable distance from the residence itself; that defendants had unlocked the gate and had permitted entry onto the premises of a vehicle which they believed to contain parrots which had just been unlawfully imported from Mexico and with the imputed knowledge that the vehicle and contents were under the Customs laws the possible subjects of search and seizure wherever found. This totality of circumstances persuades us that the search and seizure in question was a legal extended border search and was reasonable vis-a-vis the constraints of the Fourth Amendment to the Constitution of the United States.

Defendants, nevertheless, contend that the entry on private property was unreasonable and unnecessary because the officers already had the evidence they needed, that is, proof of the illegal importation and of the identity of the

conspirators. The prime source of all this proof is Preciado, the informant and an accomplice. Such testimony universally invokes cautionary instructions (Federal Jury Practice and Instructions, Devitt & Blackmar, §§ 17.02, 17.06), despite the fact that it may be legally sufficient to sustain a conviction. United States v. Andrews, 455 F.2d 632 (9th Cir. 1972). It is evidence that trailing the contraband to its ultimate recipient is very useful corroboration. This is an approved purpose of an extended border search. United States v. Canada, 527 F.2d 1374 (9th Cir. 1975); Alexander v. United States, 362 F.2d 379 (9th Cir. 1966).

The order granting the motion to suppress is reversed.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL D. JACOBSON, DAVID VAN BODEGRAVEN, COSME GUERRER-IBARRA BEATRIZ QUINTERO DE FAJARDO, MOISES MORENO-PEREZ, Defendants.	No. CR 80-126-TUC-RMB ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Defendants MICHAEL D. JACOBSON, DAVID VAN BODEGRAVEN, BEATRIZ QUINTERO DE FAJARDO and COSME GUERRERO-IBARRA have filed motions to suppress evidence seized by agents of the United States Government during a search of the premises at 4340 West Ajo Way, Tucson, Arizona, on the night of April 30, 1980. Additionally, defendants seek suppression of statements taken or any testimony by Government agents of what they saw or seized on the premises at the time of the search.

The facts related to these motions were developed at an evidentiary hearing on July 19, 1980. In early 1980 United States Customs began an investigation into large scale parrot smuggling from Mexico into the United States. Specifically, the investigation would be directed at the activities of defendant JACOBSON who operated a pet store on West Ajo Way in Tucson. Customs enlisted Mr. Gustavo Preciado to act as an informant in the investigation. The informant was dispatched to the interior of Mexico. On April 20, 1980, the informant called Customs agents and informed them that a large quantity of parrots were going to be shipped from Ruiz, Nayarit, Mexico, to Hermosillo, Sonora, Mexico. The parrots would then be shipped from Hermosillo to Nogales, Sonora, Mexico, for eventual smuggling into the United States at Nogales.

On April 28, 1980, in Nogales, Sonora, Mexico, the informant was present at a meeting between defendants BEATRIZ QUINTERO DE FAJARDO, COSME GUERRERO-IBARRA and MICHAEL JACOBSON. Defendant MOISES MORENO-PEREZ served as interpreter. Business arrangements were concluded with regard to the purchase of the parrots by JACOBSON. A business card was shown at the meeting, which had directions to defendant JACOBSON'S business on West Ajo on the back. JACOBSON destroyed the card at the meeting and informed the others present that they should not carry any papers that would show any type of relationship with him. JACOBSON further agreed to provide legal help if they should be arrested. The informant communicated the results of the meeting to Customs.

On April 29, 1980, arrangements for the smuggling of the birds were completed.

Since no other vehicles were available, the informant agreed to use his van. This information was also communicated to Government agents.

On April 30, 1980, at 3:00 P.M. the informant called Customs agents and informed them that everything was arranged for the delivery of the parrots to defendant JACOBSON in Tucson that evening. According to the plan, defendant FAJARDO would drive from Nogales to Tucson, and meet the informant with the birds in the van at the K-Mart Shopping Center on Valencia Road in Tucson. There they would trade vehicles with the women taking the van with the parrots for the actual deliv ery to JACOBSON at his residence. 1/

1/ This was done at the specific request of defendant JACOBSON who advised the informat that women arriving at his house would cause less suspicion than men.

At approximately 6:00 P.M. on April 30, 1980, the informant crossed the port of entry from Mexico into the United States. He was driving a white Chevrolet van. The van moved down along the international border fence and stopped. The van then proceeded to Tucson, Arizona. Parties stipulated that for purposes of this motion, parrots were in the van from the time it left the border fence, and that the van was under constant surveilance from the time it left the fence. The van arrived at the K-Mart in Tucson at about 7:15 P.M.

Defendant FAJARDO, together with another woman, crossed the border at Nogales in a black over blue Ford LTD at 6:20 P.M. The Ford was kept under constant surveilance from Nogales until it arrived at the K-Mart at 7:45 P.M. The women traded vehicles with the

informant, then proceeded in the van to 4340 West Ajo Way. They arrived at 8:10 P.M.

4340 West Ajo Way is a combination personal residence and commerical pet store that is jointly owned by defendants JACOBSON and VAN BODEGRAVEN. The property is completely fenced with barbed wire fence, with gates that allow access to the property from two sides. There are several buildings in the compound, together with a swimming pool and some permanent animal cages. None of the cages nor anything other than the tops of houses are visible from the public roads.

Shortly after the women arrived at the gate, a vehicle drove from the house to where the van was parked. A gate was opened, and the van moved into the compound. At 8:28 P.M. the property was completely surrounded by Government agents who were in constant radio contact. No ingress or egress could have been accomplished on the

property without detection by the officers. Agents, without either arrest or search warrants entered the property from two sides. The gates were closed at the time the agents made their entry. Further, the agents were ordered to break locks on the gates, if necessary, to gain admission to the property. While on the property, agents found two small cages within the large animal cages on the premises that contained 154 parrots.

The Government advances several theories to justify the nonconsentual, warrantless search, seizure and arrests on private property. First, the Government maintains that the search may be justified under their border search authority. United States v. Kessler, 497 F.2d 277 (9th Cir. 1974). This search occurred on private property that included a residence. It is a far from a stop of an automobile near the border. If the agents were

merely looking for goods or persons illegally entering the country, they had ample opportunity to stop the van at any time after it crossed into the country. Instead, they chose to wait over two hours and a distance of over sixty miles, from the time the van crossed into this country. Clearly, when the van entered the private property, the scope of the border search was exceeded, and other justification for the warrantless entry would be needed.

The Government's second argument is that exigent circumstances existed justifying the warrantless entry and search. In this Circuit, exigent circumstances are defined as:

> ". . . those in which a substantial risk of harm to the persons involved or to the law enforcement process if the police were to delay a search until a warrant could be obtained. The need for an

immediate search must be apparent to the police, and so strong as to outweigh the important protection of individual rights provided by the warrant requirement. There must be no practical way to avoid these risks and yet follow the Constituiton's mandate of detached judicial supervision of such intrusions."

United States v. Robertson, 606 F.2d 853 (9th Cir. 1979) at 859, citing Warden v. Hayden, 387 U.S. 294 (1967)

In this case no such exigent circumstances existed. The property was totally fenced and surrounded, so it is unlikely that those involved could escape. The Government argues that, since the parrots had not gone through quarantine, they risked the possibility of contaminating other animals and birds with communicable diseases. Clearly, if the Government was so concerned with this risk, they clearly

could have stopped the van immediately after it left the international border fence. When they knowingly allowed the unquarantined birds to come into the United States, they surely cannot argue that their presence created an exigent circumstance. The next argument is that the birds could have been released into cages, commingling with other birds already on the premises to make it difficult to recover the smuggled birds. The argument has little credence, since by the time the Government agents arrived, the smuggled birds, although still in their shipment cages, had been placed inside larger cages. If other birds had been present, clearly these birds could have been released and commingled if the smugglers had so desired before the Government agents arrived. Furthermore, the Government agnets had no credible evidence that such circumstances did, in fact, exist when they broke into the defendant JACOBSON'S premises.

Thirdly, the Government argues that the seizure was incident to the lawful arrest of defendants VAN BODEGRAVEN, JACOBSON and the two women who were still in the residence. This argument has been explicity rejected in Payton v. New York, No. 78-5420 U.S. Supreme Court (1980). The birds in question here were clearly not in plain view for the officers when the arrest was effected, even if the entry to make an arrest had been legal, which it was not.

Finally, the Government argues that the defendants had no reasonable expectation of privacy over the cages, despite the fact that there was a trespass on private property. In this case, the property was totally fenced. The cages were not visible from the road. In such a situation, the expectation of privacy was clearly reasonable. United States v. Magana, 512 F.2d 1169 (9th Cir. 1975), cert. denied, 423 U.S. 826.

In this case the Government had clear probable cause for a warrant. They were working with an informant whose credibility was proven as the crime went off exactly as he had communicated to the officers that it would. The agents knew exactly where the shipment of birds was headed. They had radios in their cars with which they could have called in to obtain a warrant. They had no reason to believe that evidence was being destroyed, or that the perpetrators of the crime were about to escape. Under these circumstances, their failure to obtain a warrant before entering the cutilage of a person's private residence, past a closed fence, is inexcusable.

IT IS ORDERED that defendants' Motion to Suppress is GRANTED. All evidence obtained directly as a result of the entry and search of the premises at 4340 West Ajo Way on the evening of April 30, 1980, is suppressed.

The Clerk of the Court is directed to mail copies of this ORDER to all counsel of record.

DATED: July 24, 1980.

RICHARD M. BILBY
UNITED STATES DISTRICT JUDGE

Opposition

Office-Supreme Court, U.S.
FILED
SEP 4 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-306

In the Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL D. JACOBSON AND
DAVID VAN BODEGRAVEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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MICHAEL D. JACOBSON AND
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the warrantless search of a compound containing petitioner Jacobson's business and residence and the resulting seizure of smuggled contraband by Customs agents violated their Fourth Amendment rights.

Petitioners were charged in a three count indictment returned in the United States District Court for the District of Arizona with unlawfully smuggling parrots into the United States and conspiracy to do so, in violation of 18 U.S.C. 545 and 371.

Following a pretrial hearing, the district court sustained petitioners' motion to suppress contraband parrots seized without a warrant from cages located in a compound containing petitioner Jacobson's business and residence. It did so on the grounds that the warrantless search was not justified by exigent circumstances (Pet. App. A28-A30) and

did not qualify as an extended border search because it occurred on private property located approximately 60 miles from the border (*id.* at A27-A28). Although agreeing that there were no exigent circumstances, the Ninth Circuit reversed the suppression order, holding that Customs agents, who had continuously surveilled a truck containing smuggled parrots from the border, could properly make a warrantless, extended border search of petitioner Jacobson's property after the truck stopped there (*id.* at A9-A14).

Petitioners contend (Pet. 11-18) that the court of appeals erred in reversing the suppression order. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to suppress the evidence. If petitioners are acquitted following a trial on the merits, their claims will be moot. If, on the other hand, petitioners are convicted, they will be able to present their present contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this interlocutory stage. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384-388 (1893); see also *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916).[1]

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[1]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1981

DOJ-1981-09